No. 95-1858

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

DENNIS C. VACCO, Attorney General of the State of New York; GEORGE E. PATAKI, Governor of the State of New York; and ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D.; SAMUEL KLAGSBRUN, M.D.; and HOWARD A. GROSSMAN, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN RESPONSE TO BRIEF AMICI CURIAE OF SEVERAL STATES

Kathryn L. Tucker
Counsel of Record
David J. Burman
Kari Anne Smith
PERKINS COIE
1201 Third Avenue, 40th Fl.
Seattle, WA 98101-3099
(206) 583-8888

Carla A. Kerr
Reid A. Muoio
HUGHES HUBBARD & REED
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

Attorneys for Respondents

Pursuant to Supreme Court Rule 15.7, Respondents submit this supplemental brief in response to the brief submitted by several states as amici curiae. *Brief of Amici Curiae States of California, et al.*[1]

I. THE AMICUS BRIEF FAILS TO MEET THE STANDARD FOR AN AMICUS SUBMITTAL

The amicus brief fails to meet the standard set forth in Supreme Court Rule 37.1, which requires that amicus briefs bring to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Petitioners have already addressed at length the issues briefed by these amici. Respondents have addressed each argument in their opposition brief and will not restate these arguments here, but will simply respond to two points raised by amici.

II. AMICI'S FEDERALISM ARGUMENT IS MISGUIDED

Amici contend that the decision below offends principles of federalism. Amici Br. at 17. This argument is misguided. Where constitutional rights are infringed by state legislative action, it is the duty of the judiciary to intervene and protect such rights.[2] *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (where the democratic process impinges on constitutional rights, "the judiciary then has a duty to intervene in the democratic process"); *Marshall Field & Co. v.*

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[1] The amicus brief presents the views of less than one-third of the states. The vast majority of states do not urge that review be granted.

[2] A recent, cogent refutation of the flawed federalism argument advanced by the states is set forth in R. Dworkin's *Freedom's Law* (Harvard University Press 1996).

Clark, 143 U.S. 649, 670 (1892) (recognizing "duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the Constitution"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Moreover, rather than usurping the states' role, the decision below respects the proper role of the state in regulating physician assisted dying. The Second Circuit's analysis relies on basic equal protection principles in ruling that New York, having passed legislation permitting physician assisted death in a variety of circumstances, cannot deny physician assistance in the narrow circumstances presented here. That is, having granted the right to medically assisted death to its dying citizens, New York cannot constitutionally deny some dying citizens an equivalent exercise of that right.

States that have granted and continue to grant the right to physician assistance in dying are free to, and indeed should, develop regulatory schemes addressing physician assisted death. Current state laws pertaining to living wills and health proxies begin to do just that. Far from ignoring states' autonomy in this area, the decision below explicitly acknowledges that states will continue to play an important role in regulating physician assisted dying. *Quill v. Vacco*, 80 F.3d 716, 731 (2d Cir. 1996).

States cannot reasonably claim ignorance with regard to what further regulatory schemes might be appropriate. Proposed schemes abound in both legal and medical literature. *E.g.*, Charles Baron et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 Harvard J. on Legis. 1 (Winter 1996); Timothy E. Quill, *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide*, 327 N. Eng. J. Med. 1380 (1992); N.Y. A.B. 6333, 219th Leg., 2d Sess. (1995).

III. STATE POLICE POWER DOES NOT TRUMP THE EQUAL PROTECTION CLAUSE

Contrary to amici's argument, the police power of states does not trump states' obligation to remain within the bounds of the Equal Protection Clause. Here, the police power does not extend to disallowing a dignified death to an arbitrary subgroup of dying citizens.

Historically, in every case in which a state has sought to constrain equal rights and liberties of individuals, the state has defended its action as within its police power. This was true where individuals sought desegregation of schools, *Brown v. Board of Education*, 347 U.S. 483 (1954), where individuals desired access to contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), where individuals of different races sought to marry, *Loving v. Virginia*, 385 U.S. 986 (1966), where women sought access to abortion services, *Roe v. Wade*, 410 U.S. 113 (1973), and where families sought to arrange the composition of their homes, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The state's argument in support of its power to act in the context of this case is far weaker than in many of the cases where this Court has determined that the police power is not as expansive as the state urged. As the Court below recognized, the proper scope of state action is limited to reasonable regulation designed to protect legitimate state interests.

Respectfully Submitted,

Kathryn L. Tucker
Counsel of Record
David J. Burman
Kari Anne Smith
PERKINS COIE
1201 Third Avenue, 40th Fl.
Seattle, WA 98101-3099
(206) 583-8888

Carla A. Kerr
Reid A. Muoio
HUGHES HUBBARD & REED
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

Attorneys for Respondents

September 10, 1996